NO. 87-844

IN THE

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

OCTOBER TERM, 1987

STATE OF CONNECTICUT,
Petitioner

v.

JAMES R. MEBANE,
Respondent

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF CONNECTICUT

BRIEF IN OPPOSITION

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DECEMBER 21, 1987

QUESTIONS PRESENTED FOR REVIEW

1. Does the refusal of a state court to declare that a Sixth Amendment violation is harmless error raise a federal question?

2. Is a trial court order sequestering a defendant in a criminal case from his counsel during a 21-minute recess and a subsequent overnight recess during the defendant's testimony a violation of the Sixth Amendment right to counsel that can be treated as harmless error?

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JURISDICTION

(1) The decision of the Supreme Court Of Connecticut was released on August 4, 1987. Petitioner's Motion To Reargue was denied on September 23, 1987.

(2) Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257(3)(1982). For reasons discussed infra, Respondent contests this jurisdictional claim.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the constitutional provision set forth in the Petition, this case involves 28 U.S.C. §1257 (1982), which provides in relevant part as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ....
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

This case turns upon a somewhat complicated set of facts. A proper

understanding of the decision of the Supreme Court of Connecticut requires a considerably more detailed statement of the case than that presented in the Petition.

On September 5, 1984, an assistant state's attorney filed a Substituted Information in the Superior Court of Connecticut for the Fairfield Judicial District charging Respondent with the crime of illegal sale of a narcotic substance, in violation of Conn. Gen. Stat. §19-480(a)(1981). (R.15.)[1] This was one count of a previous three-count information to which Respondent had entered a plea of not guilty and demanded a trial by jury. The Substituted Information was filed during the course of the trial.

The trial commenced on August 30, 1984, before a jury of six presided over by the Hon. Hugh Curran. Petitioner's case-in-chief consisted of the testimony of three witnesses, two police officers and a toxicologist, and certain physical evidence. James J. Honis testified that he was a detective in the Bridgeport Police Department and had set up a narcotics surveillance in Bridgeport on December 10, 1981. At 6:25 P.M. he observed two men pull up in a blue Chevrolet. A man, who Det. Honis identified as Respondent, approached the driver's window and handed a glassine envelope containing a white substance to the driver. The driver handed back money. Det. Honis was at the time approximately fifty feet away in an unmarked van and observed the events just related through binoculars. The transaction took twenty to thirty seconds. Det. Honis radioed a description of the blue Chevrolet to another detective, Joseph Hajducky. Det. Hajducky testified that he stopped a vehicle corresponding with Det. Honis' description at approximately 6:30 P.M. and arrested the occupants, named Edward Rich and James Kallman. A search of the vehicle resulted in the seizure of a glassine envelope containing a white powder substance. Det. Honis testified that he subsequently performed a field test on this substance, which indicated that it was heroin. A toxicologist, Charles Reading, testified that a laboratory analysis done in January 1982 confirmed this result. (Aug. T.53-60, 77-83; Sept. T.4, 29-41.)[2]

Det. Honis testified that he observed Respondent from 6:00 P.M. to

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1 "R." refers to the printed record prepared for the Supreme Court of Connecticut.

2 The trial proceedings are reported in two separately paginated volumes of transcript. "Aug. T." refers to the transcript of August 30-31, 1984. "Sept. T." refers to the transcript of September 4-7, 1984.

approximately 8:30 or 9:00 P.M. on the evening in question. Respondent was wearing a light ski jacket. Respondent eventually entered what Det. Honis termed a "ball club" in the vicinity, and Det. Honis notified Det. Hajducky of this fact. Det. Hajducky testified that he entered the club at approximately 8:30 P.M. and arrested Respondent, who matched Det. Honis' description. Det. Hajducky searched and seized from Respondent's person the sum of $201. Det. Honis testified that the man arrested was the same man he had observed at 6:25 P.M. (Aug. T.68-70; Sept. T.45-47.)

Respondent denied that he was the individual in question. In support of this contention, he presented his own testimony and that of a friend, Joe Langston. Respondent testified that he had been arrested while playing a pinball machine in an establishment known as the Red Club. He testified that he had been there 25 to 30 minutes. He had come to this establishment from a poolroom across the street where he had been playing pool with a friend named Willie Hudson.[3] He had been in the poolroom for 20 to 25 minutes. Prior to this he had been in another nearby establishment, the Raphael Taylor Center, for approximately 45 minutes playing basketball with Messrs. Langston and Hudson, who were his roommates. The $201 on his person was rent money to which Messrs. Langston and Hudson had contributed. Respondent specifically denied that he had sold drugs on the evening in question. There was some suggestion in his testimony that the perpetrator might have been Mr. Hudson, who, he testified, looked enough like him to be a brother,[4] and who, he also testified, entered the Red Club after Respondent had been there for 5 to 10 minutes. Respondent additionally testified that one other person in the Red Club had been arrested along with him. (Sept. T.80-86.)

Petitioner commenced its cross-examination of Respondent on the afternoon of September 5, 1984 - the fourth day of the trial. Throughout the trial, the court had followed the normal practice in Connecticut courts of declaring a lunchtime recess of approximately one hour and mid-morning and mid-afternoon recesses of approximately 15 minutes each.[5] No sequestration

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3 Respondent testified that Mr. Hudson was in Florida at the time of the trial. (Sept. T.85.)

4 A photograph of Respondent and Mr. Hudson was introduced into evidence in support of this claim. (Sept. T.190; Def.Ex.1.)

5 This routine was not fully followed on August 31 and September 4 because the proceedings on those days were relatively brief.

order had been requested or given at the commencement of trial, and up to this point, witnesses for both sides had been free to consult with their respective attorneys during the various mid-day and overnight recesses. However, just before the end of Petitioner's cross-examination of Respondent, this practice was dramatically changed in the following way:

> THE COURT: .... We'll take a short recess.
>
> MR. SATTI [attorney for Petitioner]: Your Honor, prior to going out, can I get a sequestration order, which I had not asked for prior to this witness. I'd like to ask for a sequestration order.
>
> THE COURT: If there are any witnesses going to testify for the defense, then that order is effective immediately. The request is granted.
>
> MR. SATTI: Can I request he not talk to his counsel since I'm in the middle of cross-examination?
>
> THE COURT: You want to sequester this witness?
>
> MR. SCHIPUL [attorney for Respondent]: Your Honor, I would strongly object to that request inasmuch as Mr. Satti has always had the opportunity to talk to his witness at any time.
>
> THE COURT: The issue was never raised by you, Mr. Schipul. It's been raised by Mr. Satti.
>
> I'll grant that request, and the witness is sequestered.
>
> MR. SCHIPUL: I'll take an exception.
>
> THE COURT: Exception. The Court is in recess.
>
> (Whereupon Court recessed at 3:22 p.m. and reconvened at 3:43 p.m.)

(Sept. T.126-127.)

After the recess, Petitioner asked a single question, to which Respondent successfully objected, and then ended its cross-examination. (Sept. T.128.) As Justice Shea of the Supreme Court of Connecticut noted in his concurring opinion, this was immediately followed by "additional questioning on redirect concerning the circumstances of [Respondent's] arrest, intended to cast doubt upon the identification of [Respondent] by the police. An extensive recross-examination followed in which [Petitioner] attempted to impeach [Respondent's] version of the arrest as well as his credibility." Petition at 23a. (Sept. T.128-145.) During this recross-examination, the following colloquy occurred.

> THE COURT: I've instructed your client numerous times when you object he should stop in his answer to the question, and he continues to answer the question. So whatever comes out, that's his problem.
>
> MR. SCHIPUL: Your Honor, as you know, I did not have an

> opportunity to talk to him at the recess, and I could have reminded him at that time.
>
> THE COURT: I suppose you could have.

(Sept. T.137.) This recross examination was followed by redirect examination, recross examination, and redirect examination. Court was recessed for the day at 4:23 P.M. (Sept. T.133-57.)

The overnight recess lasted until court opened at 10:45 A.M. on the following day - a total of over 18 hours. (Sept. T.158.) Justice Shea described the effect of the sequestration order during this period as follows.

> [T]he order may well have been viewed by [Respondent] or his counsel as precluding all discussion between them until completion of his testimony. No limitation was placed on the duration of the order and it followed immediately the issuance of a sequestration order for all defense witnesses, presumably effective throughout the remainder of the trial. The court in granting the motion relating to [Respondent] specifically ordered that "the witness is to be sequestered," although [Petitioner] had requested only that [Respondent] be ordered "not to talk to his counsel since [Petitioner] was in the middle of cross-examination."

Petition at 23a. Respondent contended in both the Appellate and Supreme Court of Connecticut that the order had had precisely this effect, see Petition at 3a n. 2 & 29a, and since he was represented in both of those courts by his trial attorney, this contention can fairly be construed as describing his trial attorney's interpretation of the order at the time.

Respondent continued his testimony following the evening recess with additional redirect examination, recross examination, redirect examination, recross examination, and redirect examination. Mr. Langston then testified that he had played basketball at the Taylor Center with Respondent and Mr. Hudson on the evening in question and that Respondent had had $200 in cash to pay the rent for the three of them. Petitioner then recalled Det. Majducky for brief rebuttal testimony, in which he denied that anyone other than Respondent had been arrested in the Red Club and that anyone fitting the description of Mr. Hudson had been there. (Sept. T.159-223.) The jury found Respondent guilty as charged on the following day.

On November 2, 1984, the court imposed a sentence of 10 years. The execution of this sentence was ordered suspended at the expiration of 5 years and a 5 year term of probation was ordered to commence thereafter. A fine of $500 was also imposed. (R.18.) As described in Respondent's Affidavit In Support Of Motion For Leave To Proceed In Forma Pauperis, Respondent was

released from correctional custody on October 17, 1987, and is currently serving his term of probation.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Justice Stevens state in his concurring opinion in Connecticut v. Johnson, 460 U.S. 73 (1983), that "federal law does not require a state appellate court to make a harmless-error determination; it merely permits the state court to do so in appropriate cases." Id. at 88. (Emphasis in original.) No federal question arises when a state court has decided that it will decline to apply the harmless error test of Chapman v. California, 386 U.S. 18 (1967). 460 U.S. at 89 n.4. We recognize that Justice Stevens' position was rejected by the other eight members of the Johnson court and that even his position may not apply where a state court suggests that "federal constitutional law compels automatic reversal." Id. Nevertheless, the Supreme Court of Connecticut declined to apply the Chapman harmless error analysis at least in part because it considered that analysis "not workable in cases of the complete denial of the assistance of counsel." Petition at 12a. Under these circumstances, there is a reasonable possibility that at least one member of this Court will consider the decision below to be based on an appropriate state court decision declining to apply the Chapman analysis on adequate state grounds. Should that occur, the question on the merits might not be resolved at all. This is exactly what happened in Johnson. Because of this consideration - particularly in combination with other considerations discussed infra - this Court should not undertake to review the decision.

II. THE CASE IS DIRECTLY CONTROLLED BY GEDERS v. UNITED STATES, 425 U.S. 80 (1976).

The Petition proceeds on the assumption that this case presents the question reserved in Geders v. United States, 425 U.S. 80, 89 n.2 (1976), of "an embargo order preventing a defendant from consulting his attorney during a brief routine recess during the trial day." This is not, however, the case. Petitioner's blithe assertion that "[Respondent] and his attorney were able to consult during an overnight recess," Petition at 7, is unsupported by any finding of either the trial court or the Supreme Court of Connecticut. In fact, the only member of the latter court to reach this issue at all found

just the opposite: viz. that "the order may well have been viewed by [Respondent] or his counsel as precluding all discussion between them until completion of his testimony." Petition at 23a. The opinion of the majority of the Supreme Court of Connecticut does not in any way contradict this finding but merely finds it unnecessary to resolve the issue. Petition at 3a n.2. For the reasons discussed in the Statement Of The Case, supra, Justice Shea's finding is sound. For this reason, the case is directly controlled by Geders, which holds that an overnight embargo on attorney-client communications like the one imposed here is a per se violation of the Sixth Amendment. Accordingly, the case does not merit review.

III. THERE ARE SUBSTANTIAL PRUDENTIAL REASONS FOR DENYING THE WRIT.

Even if this Court disagrees with the foregoing analysis - viz. with the propositions that the decision below was based on an adequate and independent state ground and that the case is directly controlled by Geders v. United States, 425 U.S. 80 (1976) - there remain substantial prudential reasons for denying the writ in this case. These reasons are as follows.

A. Respondent has been released from correctional custody.

As described in Respondent's Affidavit In Support Of Motion For Leave To Proceed In Forma Pauperis, Respondent was released from correctional custody on October 17, 1987. Although he is currently on probation and the case is not in any way moot, this Court should be aware of the fact that even an outright reversal would not result in his incarceration. A decision of this Court on the merits would, consequently, have a negligible practical effect in the case at hand.

B. The question is not likely to frequently arise.

Although Geders expressly declined to consider the question of "an embargo order preventing a defendant from consulting his attorney during a brief routine recess during the trial day," 425 U.S. at 89 n.2, post-Geders courts have universally held that such embargo orders are erroneous. There is, as discussed infra, a difference of judicial opinion as to whether such orders are per se harmful error. There is no difference of opinion as to whether they are error. All of the cases cited in the Petition at 12-13 unequivocally hold that such orders are erroneous. Both the Supreme and Appellate Courts of Connecticut were unanimous on this point. Petitioner does not contend otherwise. Given this unanimity of opinion, it is unlikely

that future courts will issue such embargo orders at all. While it would, perhaps, be unrealistic to expect that the question will never arise again, it is not likely to arise in more than a handful of cases. Under these circumstances, there is no compelling need to use this Court's scarce resources to decide the question presented.

C. A decision of this case would not resolve the principal conflict of decisions identified by Petitioner.

Petitioner purports to identify "four conflicting positions" on the question reserved by Geders. Petition at 12. In fact, there are at most three schools of thought on this matter, since a reading of the two cases that purportedly place a burden on the defendant to "[s]how [s]pecific [h]arm" - Bova v. State, 410 So.2d 1343 (Fla. 1982), and State v. Perry, 278 S.C. 490, 249 S.E.2d 324, cert. denied, 461 U.S. 908 (1983) - in fact rely on the harmless error test of Chapman v. California, 386 U.S. 18, 24 (1967), requiring a showing of harmlessness beyond a reasonable doubt. Bova cites Chapman directly, see 410 So.2d at 1345, and Perry relies on United States v. DiLupi, 651 F.2d 140 (2d Cir. 1981), cert. denied, 455 U.S. 438 (1982), which, as Petitioner itself recognizes, applies the Chapman harmless error test. Petition at 13.

In any event, it is clear from the fact of the Petition that the principal issue upon which the courts are divided is whether a defendant's failure to object to an embargo order at trial takes that order out of the category of per se reversible error. Petition at 12-13. There is, indeed, a substantial difference of opinion on this issue, but it is not on an issue presented by this case since Respondent here registered a timely objection. There is, to be sure, a third school of thought, enunciated by such decisions as DiLupi, Bova, and Perry, supra, that applies the Chapman harmless error test even if a timely objection is made, but this is very much a minority position.[6] The principal division of judicial opinion identified by Peti-

6 Although Petitioner correctly identifies a school of judicial thought applying the harmless error test of Chapman v. California, 386 U.S. 18 (1967), to the embargo order question reserved in Geders v. United States, 425 U.S. 80, 89 n.2 (1967), see Petition at 13, its list of authorities purportedly supporting this position is not altogether accurate. Bailey v. State, 422 A.2d 956 (Del. 1980), in fact holds that a harmless error analysis is not to be employed where a timely objection is made at trial. Id. at 963. United States v. Allen, 542 F.2d 630 (4th Cir. 1976), cert. denied, 430 U.S. 988 (1977), does not apply the Chapman harmless error test either, but Petitioner has nevertheless preternaturally described the present position of the Fourth Circuit, which has recently overruled Allen in Perry v. Leeke, 832 F.2d 837 (4th Cir. 1987) (en banc).

tioner simply cannot be resolved by this case.

D. The case has been correctly decided.

The most important prudential reason for denying the writ is that the case has been correctly decided by the Supreme Court of Connecticut in company with the clear majority of courts that have considered the question presented by the Petition. The rationale of the Supreme Court of Connecticut, see Petition at 12a-19a, is compelling, and, at least at this stage, only a brief discussion is necessary to demonstrate its correctness.

It is useful to begin with the constitutional text. The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right "to have the assistance of counsel for his defense." For at least 21 minutes, Respondent in this case had no counsel. This was in the middle of his trial, at the very end of Petitioner's cross-examination, just before his redirect examination. This was surely a "critical" stage of the proceeding. See Maine v. Moulton, 474 U.S. 159, 170 (1985). Petitioner does not deny either that Respondent was completely without the assistance of counsel at this critical stage or that the trial court order denying him the assistance of counsel was erroneous. That, we respectfully submit, should be the end of the matter.

This Court adopted just such an analysis in United States v. Cronic, 466 U.S. 648 (1984), when it stated that, "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." Id. at 659 n.25. It is useful to contrast this case with Cronic and its companion, Strickland v. Washington, 466 U.S. 668 (1984). The defendants in Cronic and Strickland had counsel, however inexpert, throughout the entire proceedings against them. The Respondent here did not. For at least 21 minutes at an absolutely critical stage of his trial he had not merely ineffective assistance of counsel but no assistance of counsel. This unalterable fact brings the instant case within the category of constitutional infractions so inimical to the concept of a fair trial that they can never be treated as harmless error. See Chapman v. California, 386 U.S. 18, 23 n.8 (1967).

As the Petition acknowledges, a clear majority of courts that have considered the question agree with the Supreme Court of Connecticut on this

point. Their analyses have been based not only in the larger constitutional theory just discussed but in the practicalities of the situation - practicalities quite different from those that ordinarily appear in harmless error cases. "[A] defendant in a criminal trial often needs to consult with his attorney during trial about matters other than his own testimony." United States v. Bryant, 545 F.2d 1035, 1036 (6th Cir. 1976). As the Supreme Court of Connecticut pointed out, "[T]he state has the burden of proving harmless error and yet the defendant and his attorney are the only ones realistically in possession of the relevant circumstances, i.e., what they would have discussed had they not been ordered otherwise." Petition at 12a. There is no conceivable way to show harmless error without in some substantial way intruding on the attorney-client privilege. This would be a completely unacceptable result. Given the fact, discussed supra, that the universally condemned error in question is unlikely to be repeated with any frequency, the advantages of a harmless error rule in this situation are strongly outweighed by its disadvantages. For these reasons, among others set forth in its opinion, the decision of the Supreme Court of Connecticut was correct on the merits.

CONCLUSION

The writ should be denied.

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